No. 82-6154

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1982

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NOLLIE LEE MARTIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

= =

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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A F F I D A V I T

I. ROBERT L. BOGEN, Counsel for Respondent and a member of the Bar of this Court, depose and say:

1. That the enclosed Response in Opposition to Petition for Writ of Certiorari was mailed first-class postage prepaid at the Main Branch of the United States Post Office, West Palm Beach, Florida on March 4, 1983.

2. That the Response in Opposition to Petition for Writ of Certiorari was mailed within the permitted time and was therefore fimely filed under Rule 28, Section 2, of the Rules of this Court.

Robert L. Bogen

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SWORN TO and SUBSCRIBED before me this 4 day of March, 1983.

[signature]

NOTARY PUBLIC

Notary Public, State of Florida
My Commission Expires March 25, 1985

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STATEMENT OF THE CASE

Respondent takes exception only with that part of Petitioner's Statement of the Case wherein he attempts to detail the matters presented at his suppression hearing. It is one-sided, argumentative, and misleading. To place the matter in its proper perspective, Respondent would add the following:

Respondent would note that Petitioner is no stranger to the criminal justice system. He was "street wise" to the system, having been previously convicted of various capital felonies, having previously spent time on death row in North Carolina, and currently being on parole (R 583, 609, 692).

Miranda rights were not a new thing for Petitioner that required his immediate digestion and unthinking decision making. In addition to receiving and waiving and writing his Miranda rights on July 4, 1977, and July 11, 1977, Petitioner was given and did waive in writing his Miranda rights on June 26, 1977 (the night of the homicide) (R 583-585, 603-606, 626, 637, 795). Petitioner had had a great deal of experience with the system to the extent that it could not be otherwise concluded but that he well knew his rights under Miranda, and knew how to exercise those rights. He never made any request for an attorney, nor did he ever invoke his right to remain silent (R 606, 798).

Petitioner claims that Detectives Glover and Anderson engaged in a "good guy - bad guy routine." It is true that

Detective Anderson initially came on strong with Petitioner (R 650, 651, 693-694). However, this lasted for only a total of fifteen to twenty minutes (R 693-694) of the four-hour interview. In fact, Detective Anderson was outside the room for most of the interview (R 694). Upon his reentry, Detective Anderson apologized to Petitioner, saying that he did not mean the things that he said (R 695). Beyond this short episode, absolutely no one at no time was anything less than totally courteous with Petitioner. The one aforementioned exception was neutralized by Detective Anderson's withdrawal from the room during most of the interview and his full and complete apology when he came back in.

Petitioner next states that Detective Anderson totally misled Petitioner regarding the evidence that was available against Petitioner. This is simply not the case. While Detective Anderson did tell Petitioner that Petitioner's co-accomplice had confessed, Detective Anderson did not tell Petitioner that this confession was to the instant charges (as opposed to another nearly contemporaneous criminal incident which, parenthetically, was the basis of Petitioner's arrest). In fact, Petitioner's co-accomplice did indeed make a full confession prior to Petitioner's confession, and various parts of the co-accomplice's confession (which had been tape recorded) were played for Petitioner (R 786-787).

Further, while Petitioner was told that there were three good witnesses who saw him at the Cumberland Farms store,

there was nothing false about this. In fact, all three witnesses testified at Petitioner's trial, accurately describing him, with one positively identifying him (R 3043-3089).

Finally, while Petitioner was told that an inaccurate BOLO was issued to keep him and his co-accomplice from leaving town, this was not shown to have been a falsehood. It is true that Petitioner was shown a picture of the victim's body, and it is further true that when Petitoner himself brought his uncle into the conversation, Detective Glover asked him how he thought his uncle may feel about his arrest (R 610).

It is true that the subject of religion and personal salvation was discussed with Petitioner, but Petitioner raised the subject (R 610). Further, it is true that there were adjurations for Petitioner to tell the truth. While Petitioner was told that the truth could help rather than hurt him, Petitioner was clearly informed that this meant there was sufficient evidence to convict him without a confession (which was true), and that telling the truth at this point could possibly be looked upon by the sentencing jury as a mitigating factor (R 656, 783-784). At no time was Petitioner given any assurances or promises, on many occasions being told to the contrary (R 784-785). Further, Petitioner was concerned about his personal salvation (R 780-782). To this, Assistant State Attorney Scarola, during the interview, suggested that a confession might be beneficial to that goal (R 780-782).

Petitioner was concerned about his mental state, and

felt that he needed psychiatric help (R 615). He was told that the judge would be made aware of his request for a psychiatrist. However, this promise to relate to the judge Petitioner's request for a psychiatrist did not relate to whether or not Petitioner confessed. It was collateral to the confession (R 658, 796). Petitioner makes a factual allegation that Assistant State Attorney Scarola came in and offered him legal advice. This is somewhat inaccurate. In fact, it was Petitioner who requested to speak with Assistant State Attorney Scarola (R 616). Scarola did come in and identify himself as a member of the prosecution team. Scarola explained his role in the prosecution (R 617, 776). Essentially, Scarola explained the position Petitioner was in in the context of Florida's bifurcated (guilt/innocence phase and sentencing phase) trial system. It was never indicated to Petitioner that should he not confess he would get the electric chair, but if he confessed he would not get the electric chair. No one suggested to Petitioner that they had the power to effect leniency on his behalf. The instant confession was not coerced out of Petitioner's mouth by raising the spector of the death penalty; it was Petitioner's free and voluntary choice arising from apprehension due to the situation in which he found himself that was the foundation of his decision to confess.

It is true that, at times during the July 4, 1977, interview, Petitioner became emotional, he cried, he trembled, and he seemed depressed. The question is, was his mental state

sufficient such that he could understandably waive his Miranda rights and give a voluntary confession. The trial judge observed the demeanor of the witnesses and the character of the testimony. The trial judge stated in his order that it had been very helpful to the court, in addition to the live testimony, to have the question of the voluntariness of the statement illustrated by an actual voice recording of what really occurred at the instant of the making of the statement (R 4757). The trial court noted that the context of the actual statement reflected a reasoned and logical discussion (R 4758). He further noted that the statement reflected a confident recitation of facts (R 4759).

Petitioner was apparently a man who was deeply moved by religion for, it was only at that point in the discussion that Petitioner started becoming emotional, wringing his hands, and crying at times, etc. (R 612, 648). Petitioner was described by Scarola as being under emotional strain and having emotional difficulty. However, Scarola perceived this to be a recognition by Petitioner of the seriousness of the situation with which Petitioner was confronted (R 798). Scarola stated that Petitioner acted very normal for one in Petitioner's current legal circumstances, and that Petitioner responded appropriately, recognizing the seriousness of the situation (R 3487-3488). Petitioner never appeared to lose contact with reality (R 3489-3490). Scarola perccived Petitioner as being emotionally disturbed in regard to how Petitioner felt about the

situation he was in; not emotionally disturbed in the mental sense (R 3529-3530). Detective Glover also testified that Petitioner's answers were always responsive (R 3396).

While it is true Petitioner spoke during the interview of prior periods during his life when there were uncontrollable forces, headaches, and dizziness (R 661, 671), these symptoms never manifested themselves in front of the officers.

While Dr. Vaughn testified that Petitioner was insane when he gave the statement, this testimony was refuted by the lay testimony of the various officers as well as by the manner in which Petitioner spoke on the tapes.

Petitioner also alleges that he was suffering from alcohol withdrawal during his July 4, 1977, statement. However, as previously noted, Petitioner was well-aware of his rights, for he was no novice to the criminal system. At any time, he could have stated his desire for a drink. His co-accomplice testified at trial that on the day of Petitioner's arrest, Petitioner had drunk two quarts of beer (R 3311). Notably, Dr. Vaughn testified at the motion to suppress hearing that had Petitioner been drinking within twenty-four hours of his arrest, his opinion that the Petitioner was suffering from alcohol withdrawal at the time of his confession would have changed significantly! (R 1133).

Petitioner had only to mention his physical maladies to the officers and they would have been rectified. However, he mentioned nothing. Indeed, his testimony at the motion to

suppress hearing exhibited a calculatingly selective memory. He remembered everything of a coercive nature, but he remembered nothing regarding waiving his rights or giving a confession.

Petitioner gave an extensive confession on tape on July 4, 1977. His voice did not reflect one who was craving for a drink, and one who was confessing solely for a drink. Petitioner intentionally waived his right and gave a confession.

With reference to the statement of July 11, 1977, Petitioner alleges that he had been formally charged in a non-adversary probable cause hearing, prior to which counsel had been appointed. Petitioner thus concludes that his sixth and fourteenth amendment right to the assistance of counsel was implicated in connection with this confession. However, Petitioner was not formally charged at such a hearing. The only thing that emanated from this hearing was that there was probable cause to continue holding Petitioner. Petitioner was not formally charged until an indictment was filed against him on August 4, 1977.

Regardless, with reference to the July 11, 1977, Petitioner in writing asked to speak to his parole officer and to Agent Glover. Petitioner himself initiated this contact in writing (R 757). Captain Donally told the Petitioner that his attorney did not want Petitioner speaking to anyone without his attorney's permission (R 757-758). Nonetheless, Petitioner signed a notation to the effect that he had received this warning, and told Captain Donally that he still wanted to talk to his parole

officer and Agent Glover despite his attorney's prohibition (R 762, 764). Captain Donally got Agent Glover on the telephone and heard Petitioner tell Agent Glover that Petitioner wanted to see him (R 765). Agent Glover came down and told Petitioner that Petitioner did not have to say anything, that Petitioner had counsel, and that Petitioner's counsel did not want Petitioner to say anything (R 637). Nonetheless, Petitioner again waived his Miranda rights. On July 11, 1977, when Petitioner requested to speak to his parole officer and to Agent Glover, and his parole officer responded to the request by coming to see him, Petitioner attacked her. Petitioner was therefore, obviously, subdued. As a result, Petitioner suffered a minor cut over his eye which required a couple of stitches. Petitioner characterizes this incident as a violent attack upon him. Indeed! Petitioner made no request for medical attention at this time. He was told of his attorney's advice to him. He wanted to make a statement, and he did so, waiving his Miranda rights explicitly.

Once it was demonstrated, at Petitioner's trial, that he committed the heinous crimes with which he was charged, the issue boiled down to the question of Petitioner's sanity. Seven doctors examined Petitioner on numerous occasions (R 4591-4592). Petitioner himself hired Dr. Vaughn and Dr. Levin, even prior to any court appointment (R 4592). Of all the doctors hired to examine Petitioner (at least two of which were hired by Petitioner at court expense), only one was able to come to the

conclusion that Petitioner was insane at the time of the crime. That was Dr. Vaughn who testified on Petitioner's behalf. All the other testifying doctors were of the opinion that Petitioner was feigning insanity (R 3756-3759, 3764, 3842, 3914, 3920).

It is to be noted that no doctor was hired on behalf of the prosecution; with the exception of those that were hired by Petitioner, all the other doctors were court-appointed. The prosecution's case-in-chief demonstrated that Petitioner committed the crimes he was charged with. Petitioner's case-in-chief attempted to demonstrate that Petitioner was insane at the time. The prosecution's rebuttal evidence contended that Petitioner was not in fact insane, but was feigning insanity. Now, on surrebuttal, Petitioner sought the court appointment of an eighth expert to impeach the conclusions (by attacking the way he performed the tests) of only one of the doctors which the prosecution presented on rebuttal.

REASONS FOR DENYING THE WRIT

POINT I

PETITIONER'S CONFESSION WAS VOLUNTARY, DESPITE HIS CONTENTIONS THAT HE WAS INSANE.

Petitioner contends that he was, in all probability, insane at the time of his confessions. The trial judge found otherwise. The jury found otherwise. The Florida Supreme Court found otherwise. As a result of these findings, which are presumptively correct under Sumner v. Mata, ___U.S. ___, 102 S.Ct. ___, 71 L.Ed.2d 480 (1982), Petitioner recognizes that Blackburn v. Alabama, 261 U.S. 199 (1960) cannot control his case. The evidence in the case sub judice most certainly did not "indisputedly establish" insanity.

Nonetheless, Petitioner urges this Court to accept jurisdiction over this case to establish a standard for evaluating the constitutionality of a confession which may have been the product of insanity. It would seem axiomatic that "voluntariness" is the key to whether a confession is voluntary, and the degree to which a person might be insane is but a factor which goes into the ultimate finding of voluntariness. Blackburn v. Alabama, supra, already establishes the relationship between insanity and voluntariness of a confession.

Petitioner keeps stating that his evidence at the motion to suppress hearing was uncontradicted. In fact, as pointed out in Respondent's Statement of the Case, there was quite a bit of contradiction. The witnesses were not in agreement,

and differing opinions came from the witness stand. It is to be noted that the only witnesses who testified favorably to Petitioner with reference to this issue were not present during the confessions.

In essence, Petitioner asks this Court to believe Dr. Vaughn's testimony (that Petitioner was insane despite his ability to act and sound as if he were absolutely in control of all of his faculties) rather than the testimony of all the other witnesses who testified to the contrary.

Furthermore, it is to be noted that there was other, direct evidence of Petitioner's guilt. Petitioner was identified by one witness who observed the kidnapping (R 3056-3057). Petitioner's co-accomplice gave a chilling account of the whole affair (R 3215-3286). The circumstantial evidence additionally pointed to Petitioner, as well as collaborated the co-accomplice's testimony.

There is no issue here which is of great public importance requiring resolution by this Court in order to provide guidance to the judiciary.

POINT II

THE STATE TRIAL COURT'S REFUSAL TO APPOINT AN EIGHTH PSYCHIATRIST TO EXAMINE PETITIONER WAS NOT ERROR.

There is no question but that the constitution can tolerate no discrimination between indigent defendants and defendants who possess the means to protect their rights. Such is not at issue here. Petitioner admits that he received the benefit of defense experts. He was examined by seven different psychiatrists and psychologists, many of whom were hired by the defense attorney at court expense. But Petitioner wanted one more. Under the facts of this case, it cannot be said that Petitioner was denied the equal protection of the laws. Petitioner wanted this last expert (for surrebuttal purposes) to challenge the conclusions of only one of the other experts who testified at trial, Dr. Scherer. However, if any of the other experts felt that Dr. Scherer's conclusions were unsupportable, Petitioner could have called them. The nature of psychiatric testimony makes such testimony a swearing contest. Such testimony must end somewhere. Just because Petitioner was able to find a psychologist who could impeach the conclusions of only one of the many doctors who testified against Petitioner does not make the trial court's failure to authorize Petitioner to obtain the services of that doctor a denial of equal protection under the laws. This must be the case in view of the many doctors who examined Petitioner, including two of Petitioner's own choosing.

POINT III

THE FLORIDA SUPREME COURT CONSIDERED EACH AND EVERY POINT RAISED BY PETITIONER ON DIRECT APPEAL.

Petitioner complains of the writing style of the Florida Supreme Court in the instant case. In his opinion, they simply did not write enough. However, the Florida Supreme Court did go through the facts of the case and the aggravating factors that were found by the trial judge. The aggravating factors were indisputably supported by the facts of this case it was self evident upon the face of the opinion of the Florida Supreme Court.

Petitioner merely faults the Florida Supreme Court for not discussing at length various legal issues which he raised. It is nonetheless evident, however, that the application of the facts of this case to the aggravating factors that were found by the trial judge was dealt with in the opinion. It cannot be said that the Florida Supreme Court's opinion renders the death penalty in this case nothing more than arbitrary.

Finally, in an apparent last-ditch effort to have this Court accept certiorari jurisdiction over this matter, Petitioner claims that this case presents precisely the same issue currently before the Court in Barclay v. Florida, No. 81-6908. It is self-evident that this is not the case. The Florida Supreme Court struck no aggravating factors. Anyone could conclude that the aggravating factors found by the trial judge in the instant case were supported beyond a reasonable doubt by the evidence.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, Respondent would respectfully request that this Honorable Court decline to accept certiorari jurisdiction over the instant matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida has been furnished, by courier/mail, to RICHARD H. BURR, III, ESQUIRE, Assistant Public Defender, 224 Datura Street - 13th Floor, West Palm Beach, Florida 33401, this 4th day of March, 1983.

Of Counsel